



IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. _____

77-314

CHESTER PAUL SWONGER
ZELLA FAYE FARMER and
JESS WARREN PIERCE Petitioners

DEFEND

UNITED STATES OF AMERICA Respondent

PETITION FOR THE WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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IN THE

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No. _____

CHESTER PAUL SWONGER**ZELLA FAYE FARMER and****JESS WARREN PIERCE***Petitioners*

v.

UNITED STATES OF AMERICA*Respondent***PETITION FOR THE WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT****OPINIONS BELOW**

None of the opinions and orders of the courts below has been published. Copies of the District Court's memorandum of December 11, 1975, denying the pre-indictment motion to return property and suppress evidence, and its memorandum of November 9, 1976, forfeiting the automobile and the orders of the United States Court of Appeals for the Sixth Circuit affirming the judgment of conviction and denying a motion and petition for rehearing en banc are appended hereto.

JURISDICTION

(i) The petition seeks review of the order of the Court of Appeals affirming the petitioners' conviction and the forfeiture of the automobile of one of them in consolidated appeals of a criminal case and a "civil" forfeiture case entered June 21, 1977, and from an order entered July 28, 1977, overruling the appellants' petition for rehearing.

(ii) The order respecting the rehearing was dated July 28, 1977, and an order was entered August 5, 1977, staying issuance of the Court of Appeals mandate for 30 days from its date pending application to this Court for the writ of certiorari, pursuant to Rule 41(b), Federal Rules of Appellate Procedure.

(iii) This Court has jurisdiction of this petition pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether two altered Federal Reserve notes and allegedly associated "green goods" paraphernalia were illegally seized in a warrantless search of luggage found in a warrantless stationhouse search of an automobile trunk for allegedly stolen diamonds, where the automobile and the luggage it contained were in complete control of officers, and there was at the time a magistrate present in the stationhouse to whom they could have applied for a warrant.

2. Whether other evidence found in the warrantless stationhouse search of the automobile was also illegally seized under the same circumstances.

3. Whether the original warrantless stop and seizure of the automobile on the highway were illegal because any exigent circumstances had evaporated, where:

(a) The officers had all the information on which they claimed to have based their decision to stop the car to search for stolen diamonds before 10 a.m. and the car was not stopped until 3 p.m.

(b) The original information about stolen diamonds was known at a time when it related only to one defendant, Pierce, and an unindicted companion who were afoot at the time and under surveillance by a large number of state and local officers.

(c) Subsequently the officers lost sight of Pierce on at least three occasions and observed him in company with three persons the officers never investigated, and they failed to investigate at least two vehicles in which any diamonds he might have had in the beginning might have been carried away.

(d) The officers watched while all three defendants loaded the car trunk with various pieces of luggage at a motel and while they stopped for gasoline at a nearby service station, and waited until they had driven some 30 miles westward on an interstate highway before deciding to stop the car.

4. May a judge effectively force counsel of the defendants' choice to withdraw on the basis of a pos-

sible but not necessary conflict of interest among the defendants where the judge had held that the defendants had made a competent and understanding waiver of their rights under oath and the only result was to avoid an otherwise appropriate severance of defendants?

5. May the trial judge and the prosecutor agree upon dismissal of an indictment in the absence of all the defendants and of counsel for one of them over the objections of counsel for the other two for the expressed purpose of obtaining a new indictment conforming to the criminal forfeiture provisions of the Federal Rules of Criminal Procedure, Rules 7(c)(2), 31(e) and 32(b)(2), where the rules were disregarded on the trial and the only result was to avoid an otherwise appropriate severance?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

CONSTITUTION OF THE UNITED STATES:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

—Amendment [IV]

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . ; nor

shall any person . . . be deprived of life, liberty, or property, without due process of law. . . ."

—Amendment [V]

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense."

—Amendment [VI]

STATUTES:

Title 18, United States Code

"§ 2. *Principals*

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

"(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

"§ 472. *Uttering counterfeit obligations or securities*

"Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than \$5,000 or imprisoned not more than fifteen years, or both."

Title 49, United States Code

“§ 781. Unlawful use of vessels, vehicles, and aircrafts; contraband article defined

“(a) It shall be unlawful (1) to transport, carry, or convey any contraband article in, upon, or by means of any vessel, vehicle, or aircraft; (2) to conceal or possess any contraband article in or upon any vessel, vehicle, or aircraft, or upon the person of anyone in or upon any vessel, vehicle, or aircraft; or (3) to use any vessel, vehicle, or aircraft to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of any contraband article.

“(b) As used in this section, the term ‘contraband article’ means:

“(3) Any falsely made, forged, altered, or counterfeit coin or obligation or other security of the United States or of any foreign government; or any material or apparatus, or paraphernalia fitted or intended to be used, or which shall have been used, in the making of any such falsely made, forged, altered, or counterfeit coin or obligation or other security.”

FEDERAL RULES OF CRIMINAL PROCEDURE

“Rule 7. The Indictment and the Information

“(c) Nature and Contents

“(2) *Criminal Forfeiture.* When an offense charged may result in a criminal forfeiture, the

indictment or the information shall allege the extent of the interest or property subject to forfeiture.”

“Rule 31. Verdict

“(e) *Criminal Forfeiture.* If the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any.”

“Rule 32. Sentence and Judgment

“(b) Judgment.

“(2) *Criminal Forfeiture.* When a verdict contains a finding of property subject to a criminal forfeiture, the judgment of criminal forfeiture shall authorize the Attorney General to seize the interest or property subject to forfeiture, fixing such terms and conditions as the court shall deem proper.”

STATEMENT OF THE CASE

Preliminary Procedural Summary

These cases involved three evidentiary hearings: (1) on a pre-indictment motion to return property and suppress evidence; (2) the first trial ending in a hung jury; and (3) a second trial ending in conviction of all three defendants for possession of two altered Federal Reserve notes with intent to defraud. The

"civil" forfeiture case was consolidated with the criminal case for trial and on appeal.

There were several other pre-trial hearings in chambers and in Court plus a number of rulings made without hearings on pre-trial motions. The following preliminary chronology should assist the Court in placing the questions presented in the context of the unusually protracted proceedings:

1975

October 10—The contested search.

October 14—Warrant for arrest of petitioners.

October 22—Petitioners moved for return of property and suppression of evidence.

November 19—One-count indictment filed charging petitioners with possession of altered "bills" with intent to defraud in violation of 18 U.S.C. §§ 472 and 2.

November 25-26—Hearing on motion to suppress.

December 5—Other pre-trial motions filed; denied except for routine discovery without hearing or opinion Dec. 9.

December 11—Memorandum and order entered denying petitioners' motion to return and suppress.

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January 19—Petitioners Swonger and Farmer move for severance.

January 26—Petitioner Pierce moves for continuance.

February 4—Written motion filed to reconsider motion to suppress on basis of intervening published case and other grounds; oral hearing held. All motions except motion to re-set overruled; court gave counsel a week to "iron out" conflict issue.

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February 11—Further hearing on conflict.

February 13—Counsel moved to withdraw.

February 20—Herbert R. Rich representing Swonger and Farmer, William C. Wilson representing Pierce. Trial set April 1.

March 23—Civil complaint for forfeiture of automobile filed.

March 30—Request of Pierce's counsel for continuance because of continuing criminal trial in state court denied, counsel ordered to report status of state case by 2 p.m. daily and all defendants required to report daily until trial.

March 31—Chambers conference held on request of Swonger and Farmer for severance and immediate trial and government counsel's request for continuance. Both denied. Government's motion to dismiss indictment to allow new indictment granted.

April 12—New indictment returned with identical first count and addition of count charging all three defendants with use of automobile to transport and conceal contraband in violation of 49 U.S.C. § 781 and 18 U.S.C. § 2.

May 3—Defendants arraigned on second indictment, trial set June 10.

May 7—Farmer files claim and answer in forfeiture case, and all defendants file pre-trial motions.

May 27—All pre-trial motions denied without hearing.

June 7—Government seeks delivery of automobile.

June 10, 11, 14—First trial ends with hung jury; motions for acquittal denied. No ruling on forfeiture.

July 13, 14—Second trial ends in verdict of guilty; Pierce motion for acquittal denied; Swonger, Farmer motions for acquittal taken under advisement. No ruling on forfeiture.

July 21—Pierce post-trial motions filed; denied without hearing July 23.

August 2—Swonger, Farmer motions for judgment of acquittal denied.

August 16—Petitioners sentenced.

August 23—Joint notice of appeal in criminal case.

October 13—Motions for return of automobile filed; denied October 18 without hearing.

November 9—Memorandum and order entered granting forfeiture in civil case.

November 19—Notice of appeal in civil case.

Statement of Facts¹

SEARCH AND SEIZURE

On the evening of October 9, 1975, Dr. John E. Wilkison, a surgeon with offices on the public square in Springfield, Robertson County, Tennessee, telephoned F.B.I. Agent Don Birdwell of Clarksville, Tennessee, and said he had made an appointment with one Fred Fisher to bring another person to the doctor's office at 9 a.m., or between 8 and 9, the next morning with respect to possible sale of some diamonds or stolen diamonds to the doctor.

¹All facts in this statement, including conflicts, are taken from testimony of witnesses on whom the government relied.

Early on October 10, Birdwell and Agent Bill Holt of the Tennessee Bureau of Criminal Identification, set up electronic equipment in the X-ray room on the second floor of the doctor's office to eavesdrop and to record the conversation with Fisher and his companion.

At 8:45 a.m., T.B.I. Agent Bill Vest parked his car across the public square from the doctor's office, at a point where he could not see the office entrance. Robertson County Sheriff Ted Emory and Springfield Detective Mike Wilhoit were also involved in the surveillance plan.*

Birdwell testified on the suppression hearing that the electronic equipment did not work very well, but that he had heard the words "twenty thousand" and "stolen diamonds," on the tape. The Court declined to order production of the tape at the suppression hearing. On the subsequent trials Birdwell admitted the electronic equipment did not work at all, nothing intelligible could be heard on the tape, and the agents did not listen to it in the office. On this trial he recalled hearing other things on the direct listening device, but was not sure he had heard "hot" or "stolen diamonds" at that time.

All of the officers' information about the meeting of the doctor with Fisher and his companion, therefore, was obtained from the doctor, but it is not at all clear how much of what the doctor testified to was communicated to the officers before the challenged search.

*The only officers involved in or observing any of the surveillance or the later search and seizure who were called by the government at the suppression or first trial were Birdwell and Vest. One additional state officer involved in the search was called on the second trial.

About 8:30, 9, 9:10, or 9:30 a.m., Fisher arrived at the doctor's office with a man he introduced as Sam Clark of Bowling Green, Kentucky, but who was identified after his arrest as the petitioner, Pierce.

Pierce showed the doctor four stones, which the doctor said he believed were genuine diamonds worth about \$75,000, but also referred to at one point as "fake." Pierce asked \$20,000 for them. The doctor was told they were brought from the East Coast or some two thousand miles away, or thousands of miles away over seven years earlier.

Dr. Wilkison told Pierce the stones were too valuable for him to make a decision without having them examined by an expert. Pierce told the doctor Fisher would make arrangements to bring them back when the doctor's expert was available.

Fisher and Pierce then left the doctor's office and the doctor went to the room where the officers were or they came down to where he was and the doctor told them what had happened. While he was talking, the officers were either listening to see what they had on the tape or they left immediately after Fisher and Pierce, saying, "We are going to rush off, because we don't want to let these people get away."

At any rate, the officers left the office about 9:30 or 9:35 a.m. by the rear door.

Meanwhile, Agent Vest received a radio call from Birdwell or Holt alerting him to the departure of Fisher and Pierce. He saw or did not see Fisher and Pierce leave the doctor's office, but he saw the two getting in a truck. Vest followed the truck to a cafe

about a mile and a half south. He did not see either of the two men get out of the truck, but he radioed Holt, Birdwell and the sheriff to shift surveillance to the cafe.

About 20 minutes later Fisher came out of the cafe alone and drove the truck back north toward Springfield. Vest followed the truck until it was parked about a block south of the sheriff's office, where it was kept under surveillance the rest of the morning.

Vest did not see Pierce leave the truck or the cafe, but later he received information via Holt that Springfield Police Sergeant Claude Anderson had reported a man of Pierce's description had been seen driving south toward Nashville in a brown Buick with Arkansas license tags.*

At 11:55 a.m., Fisher reappeared, got in the truck and drove south to another restaurant with Agents Vest and Birdwell following him. Another version was that Birdwell and Vest just decided to go to lunch and found Fisher at the cafe.

Fisher entered the restaurant and took a booth followed by Vest and Birdwell, or Birdwell and Holt, or the sheriff, or all of them. Vest and Birdwell or Birdwell and Holt had lunch.

About 12:15 p.m. a man later identified as Curtis Mott entered and sat down with Fisher. Then Pierce

*A telephone check that morning with Arkansas state police about 10:30 or 10:45 turned up outdated information that the tags were registered to a Cadillac owned by a "lady named Foreman." This wrong information and garbling of Miss Farmer's name apparently was caused by bureaucratic error or delay, or by too hasty telephone reporting and recording, because it was shown on the hearing that the registration had been properly transferred from Miss Farmer's Cadillac to her Buick.

came in about two minutes later. Fisher, Pierce and Mott⁴ went into a rear dining room of the restaurant out of sight of the officers. Or Pierce and Fisher went back and the third person came in later. Or Vest saw Pierce, Fisher and Mott sit down together in the rear dining room.

Vest, Birdwell and/or Holt went out and set up surveillance across the street where they could watch the Buick. About 12:45 or 1 p.m. Fisher, Pierce and Mott came out of the restaurant. After a brief conversation, Mott walked north, Fisher drove the truck in the same direction, and Pierce drove the Buick south toward Nashville. No officer followed either Fisher or Mott.

The Buick was followed by Vest and Birdwell in one car, Vest driving; by Holt and Sheriff Emory in a second car, and by Detective Wilhoit in a third car. Wilhoit lost contact with the caravan on the way. They followed the car, sometimes at high speed, to Nashville where Pierce stopped at a motel and went inside while the agents continued to watch the car.

About 15 to 30 minutes later all three defendants and a man identified later as one Don Wisdom emerged from the motel. All three defendants put luggage⁵ into the car and left with Miss Farmer driving, Pierce in the right front seat and Swonger in the back seat. They stopped nearby for gas but no effort was made to search the car there. Wisdom drove off in another

⁴The government did not produce Mott until the trial.

⁵No evidence indicated which defendants loaded which pieces of luggage.

automobile, the officers noted the license of Wisdom's car but did not follow it.

The officers in both automobiles (not marked as official vehicles) followed the Buick, which went onto an interstate heading west from Nashville.

Vest and Birdwell (or Vest alone by Birdwell's consistent emphasis) decided at the time the Buick turned toward Memphis "to stop the vehicle and search it based on the information we had concerning the stolen diamonds." Birdwell said he did not consider he had jurisdiction at the time the car was stopped.

About 30 miles west of Nashville in Dickson County Vest drove his car alongside the Buick while the officers in the following car fell in behind the Buick flashing "their bright lights." Vest said Birdwell leaned out of the right-hand window⁶ to show his F.B.I. identification and "had the car pull over." This was at 3 p.m.

After stopping their car ahead of the Buick, Vest and Birdwell and Sheriff Emory went to the Buick. Vest instructed all three occupants to get out of the car, and asked them for identification. The two men were searched almost immediately.

"So," said Vest, "at that time I informed the three people why we had stopped the car, that I was going to search the car on the basis of *suspicion* that they were transporting stolen diamonds, and then I proceeded to have the two males patted down, and then I gave a cursory search of the car for weapons" [Emphasis added].

⁶Birdwell denied "leaning out."

He found no weapons, but he found a small amount of marijuana in a purse in the back seat, and Sheriff Emory or Agent Birdwell removed from the "floor-board of the back seat" a pipe Vest said he "knew to be used to smoke marijuana with," and Agent Birdwell said he saw two marijuana cigarettes in an ashtray in the rear of the car.

"After I found the marijuana, I placed all three of them under arrest on the side of the road for possession of marijuana for the purpose of resale," Vest said.

Vest opened the trunk and found it "absolutely full of clothes and suitcases and what have you" and told the defendants that he was unable to make a proper search on the side of the road. They drove to the Dickson County Sheriff's Department.

After arrival at the Dickson County Sheriff's Department, Vest, then joined by fellow T.B.I. Agent George Haines, began a thorough search of the defendants and then of the car and seized most of the contents.

No effort was ever made to obtain a warrant for arrest or search, according to the officers, at any time from Dr. Wilkison's first telephone call to Birdwell on the evening of October 9, 1975, until the time of the search after 3 p.m. October 10, although the agents knew how to apply for warrants from easily available magistrates in Springfield, Nashville, and in Dickson County.

In the trunk of the car, Vest found a brown United Airlines flight bag with two compartments. In the outside compartment he found a General Motors Acceptance Corporation payment book in the name of

J. W. Pierce, Route 1, Box 162, Jericho Springs, Missouri, which contained one one-hundred dollar federal reserve note and one ten-dollar federal reserve note; a map of northeastern United States which contained hundred-dollar and ten-dollar notes bearing the same serial numbers as the two in the payment book; a Missouri map, a checkbook with the name Mr. or Mrs. Wallenburn on the cover and containing checks with the name J. W. or Mrs. P. Louise Pierce, Route 2, Box 162, Jericho Springs, Missouri; an Albuquerque Trans World Airlines guide and two airline tickets, and a brown wallet containing identification of Jess Warren Pierce.

In another section of the bag, Vest found a plastic box containing four stones that looked to him like diamonds, 17 similar empty plastic boxes in a long black box, a plastic box and a plastic packet containing gold coins, a shaving kit, toilet articles, numerous tools and four silver dollars, and a number of containers, including those from which the gold coins had been removed.

In a man's coat in the trunk he found, among other things, two more plastic boxes with some stones in them, one small black purse containing what Vest called a carat stone handler, a ten-power magnifying glass, and a diamond weight calculator.

In a brown leather satchel or brief case, he found a board eighteen inches long, a tray containing various bottles of solutions, two glass vials with some type of metal in the middle of it, cotton balls, a cork, scissors,

three tooth brushes, tweezers and a measuring cup, two metal pans, four rubber gloves, a notebook of white paper, numerous pieces of white paper and discolored white paper, an envelope, a binder and a rubber band.

In a gray "tourister" piece of luggage in the trunk he found three sets of dice marked Aladdin, Las Vegas, Nevada, one set having the numerals one through six on each die, one set having only the numerals one, three and five, and one set having only the numbers two, four and six, and a pill bottle with the name, Jeff Pierce, on it.

In the glove compartment of the car, he found another plastic box with four stones appearing to be diamonds in it.

In a toilet kit wired to the frame of the car beneath the hood, Vest found a number of what he called identification cards bearing the name of W. L. or William L. Rogers, one of which, he said, bore the picture of the defendant, Swonger.

In Miss Farmer's purse, Vest also found cards bearing the name, Faye Benson, or Mrs. James C. Benson, or James C. Benson. One of the Faye Benson cards, he said, bore the picture of Miss Farmer.

He found no evidence that Pierce carried any identification other than his own.

Under the right front floor mat of the car, he found twenty genuine hundred dollar "bills" fanned out and lying flat, appearing to be new bills. In the trunk, in a shirt pocket, he found \$3,500, consisting of ten hundred-dollar "bills" and fifty ten-dollar "bills."

In Miss Farmer's purse he found \$139, and in her wallet a paper with a handwritten note and hand-drawn map of a portion of a town in Oklahoma.

Birdwell found \$5,100 in hundred-dollar and fifty-dollar "bills" stuck behind Swonger's belt.

A number of packs of playing cards and a number of road maps were also found in the car.

T.B.I. Agent John W. Carney searched the person of Pierce at the sheriff's office in Dickson, although his name was not mentioned during the hearing on the motion to suppress, and he was not presented by the government as a witness for any purpose until the second trial.

Carney said his search of Pierce produced two rolls of notes amounting to \$5,973. One roll contained two hundred-dollar "bills," two twenty-dollar "bills," one ten-dollar "bill," four five-dollar "bills," and three one-dollar "bills," totaling \$273. The other contained 44 hundred-dollar "bills" and 26 fifty-dollar "bills."

Cross-examination that might have destroyed his credibility was interrupted by the Court when Carney testified erroneously that the notes found on Pierce included notes with duplicate serial numbers.

All of the "bills" found by all the searching officers were genuine Federal Reserve notes. None was altered except that two of the four notes found in the piece of luggage containing items bearing Pierce's name had been altered so as to appear identical to the two unaltered notes. No stolen diamonds were found.

Except for the "matched sets" of notes, all of the currency was returned, along with gold coins and most

of the clothing. But testimony about all of the currency was introduced, and most of the rest of the fruits of the search were introduced as exhibits or otherwise, except the playing cards and the evidence of minor marijuana use.

CONFLICT OF INTEREST

At a hearing on a motion for severance on behalf of Petitioners Swonger and Farmer, a motion for continuance on behalf of Petitioner Pierce, and a joint motion to reconsider the motion to suppress on the basis of an intervening Sixth Circuit decision⁷ present counsel sought to have the case re-set to permit an associate who had become sick the previous day to present results of his research on the admissibility of certain evidence the government obviously intended to introduce at the trial.

Counsel stated to the Court that if the evidence was held admissible it might put him in a conflict of interest with respect to advising the clients whether to testify.

The Court said counsel had a conflict of interest "Because I am going to let that evidence in, I will be perfectly truthful with you about it."

It denied all motions except that he re-set the trial date and gave counsel a week to straighten out the conflict problem.

On February 11, 1976, counsel presented the Court with a sealed sworn statement of all three petitioners that they understood the conflict problem and still

⁷*United States v. Birmley*, 529 F. 2d 103 (6th Cir. Jan. 29, 1976).

wanted present counsel to represent all of them. The sworn statement showed the anticipated conflict would not, in fact, arise on a joint trial.

The Judge told the petitioners: "This Court understands what you are trying to do is force this Court to make a severance when this Court has determined there is not going to be a severance."

He held the sworn statement, as reaffirmed by each of the petitioners in open court, was a valid waiver of their right to separate counsel and a valid exercise of their right to go to trial with the attorney of their choice, but he made it clear this ruling would not protect counsel and that "I want the record to show that . . . I am not in any way countenancing any alleged conflict on the part of the attorney, because the attorney's representation is fully voluntary on his part. He is not required to accept employment, and if he does accept employment, he necessarily runs the risk of the result of that conduct. . . ."

Under this pressure, present counsel considered he had no alternative but to withdraw, and after further consultation with his clients he did move to withdraw over their objections.

As it turned out, no conflict developed on the trial even with separate counsel. No defendant testified.

CONTINUANCE AND SEVERANCE

On March 25, 1976, new counsel for Petitioner Pierce wrote the trial judge asking for a continuance because of matters beyond his control that would tie him up in a protracted state criminal trial beginning

March 29, 1976, which would probably be continuing on April 1, the date set for trial in this case.

On March 30, 1976, the Court entered an order denying the continuance, requiring Pierce's attorney to report the status of the state case by 2 p.m. each day beginning on the day before the trial date and requiring all defendants to report for trial on a daily basis.

On the afternoon of March 31, 1976, counsel for Petitioners Swonger and Farmer was granted a chambers conference at which he moved for a severance and an immediate trial for his clients because they were staying at a motel at great expense and inconvenience, waiting and ready for trial. The assistant United States attorney was present, but Pierce's counsel was not present, and none of the petitioners was present.

Then the matter came up of Rule 7(c)(2), Federal Rules of Criminal Procedure, requiring that an indictment in a case involving a criminal forfeiture include an allegation of the interest to be forfeited. The government attorney cited a Ninth Circuit case holding an indictment bad after conviction for failure to comply with the rule.⁹

Counsel for Swonger and Farmer asked for time within which to consult with his clients about possible waiver of the rule in the interest of obtaining a speedy trial, but the judge indicated strongly that government counsel should not take the risk. Thereupon government counsel moved for a continuance to April 13, 1976, to allow re-presentation to the grand jury. The judge denied this, commenting in part: "If I gave you a

continuance, I would be guilty of the worst sort of inequitable treatment, I'll put it like that, and you ain't gotten there yet—that's not gonna look so good in the record." Then the following colloquy ensued:

"By Mr. Whitley: The only thing left for me to do is move to dismiss the indictment.

By the Court: Granted. Motion made and granted and advise everybody and start all over again.

Now you can tell your defendants—draw an order and I will sign it today and we will notify all of the defendants and they can go on their way.

And, after all, the FBI can find them again if they have to or the Marshal's office or somebody."

The result was no different in effect than a continuance, except that defense counsel had to go through all the pre-trial motions again, this time without hearings even on suppression. The new indictment was filed under the same case number.

At the trial, counsel attempted to have the added forfeiture count submitted to the jury in accordance with Rule 31(e), a companion to Rule 7(c)(2). The Court overruled this and the cases proceeded to trial as if the new indictment had never been returned.

After conviction, on instructions of the court, counsel for both the petitioner, Farmer, and the government submitted proposed findings of fact and conclusions of law on the automobile forfeiture on July 22, 1976.

On August 17, 1976, judgments on the jury verdict of conviction in the criminal case was entered reciting

⁹*United States v. Hall*, 521 F. 2d 406 (9th Cir. 1975).

conviction under the statutes cited in both counts, but this was amended August 30, 1976, to eliminate reference to the statute cited on the second count which had been added in purported compliance with Rule 7(c)(2), *supra*.

Meanwhile, present counsel had been re-employed for purposes of appeal and had filed a notice of appeal in the criminal case on August 23, 1976.

On October 13, 1976, no order disposing of count two of the criminal indictment or the civil forfeiture claim having been entered, counsel filed a motion under the criminal case number to return the automobile, which was denied the same day by use of a rubber stamp.

On November 9, 1976, the court finally entered a memorandum and order granting forfeiture of the automobile under the civil number, still leaving the second count of the indictment without disposition. The forfeiture order was appealed 10 days after its entry.

JURISDICTION OF THE COURT OF FIRST INSTANCE

The United States District Court for the Middle District of Tennessee, Nashville Division, had jurisdiction of the indictments alleging offenses committed within the district and division under 18 U.S.C. § 3231.

ARGUMENT EXPANDING ON REASONS FOR GRANTING CERTIORARI

1. The Court of Appeals Decided the First Question Regarding Search of Luggage Found in the Trunk of an Automobile in Police Custody in Conflict With an Applicable Decision of This Court.

On the same day the Court of Appeals entered its original order affirming the judgment of the District Court, this Court entered its opinion in *United States v. Chadwick*, 433 U. S. —, 45 Law Week 4797 (June 21, 1977) invalidating the search of a locked footlocker after it and the car in which it was found were safely in federal custody.

This Court held:

“[W]arrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest either if the ‘search is remote in time or place from the arrest,’ *Preston v. United States*, 376 U. S. at 367, or no exigency exists.

“Here the search was conducted more than an hour after federal agents had gained exclusive control of the footlocker and long after respondents were securely in custody; the search therefore cannot be viewed as incidental to the arrest or as justified by any other exigency.”

—45 Law Week at 4801

The decision of the Court of Appeals in the present case flies directly in the face of these principles.

2. The Court of Appeals Decided the Second Question Presented Here in a Manner Conflicting With Similar Questions Decided by the United States Court of Appeals for the First Circuit and Not Challenged by the Government on Its Petition for Certiorari in the Case Mentioned in Point 1.

In *Chadwick v. United States*, 532 F. 2d 773 (1st Cir. 1976), affirmed on the narrow question of a locked footlocker by this Court in *United States v. Chadwick*, *supra*, the Court of Appeals held the searches of two locked suitcases found in the same car, one in the trunk, the other in the passenger compartment, after their transportation in the seized car to headquarters to be illegal. The government did not contest this holding on certiorari. See 45 Law Week at 4798, footnote 1.

No rational distinction can be drawn between the cases, and the First Circuit holding stands in direct opposition to the holding in the present case, with no material distinguishing factors. Furthermore, this part of the *Chadwick* case and this case represents a question that has not been, but should be, decided by this Court to complete the obvious meaning of what was decided in *Chadwick*.

It should be noted that the Court has implied that *Chadwick's* holding might extend even to hand-carried luggage by its remand of *United States v. Schleis*, 543 F. 2d 59 (8th Cir. 1976), for reconsideration in the light of *Chadwick*, see *Schleis v. United States*, 45 Law Week 3839 (June 27, 1977).

3. The Court of Appeals Decision of Question 3 Presented to This Court Is in Direct Conflict With a Recent Prior Decision of This Court.

In *G. M. Leasing Corp. v. United States*, — U. S. —, 50 L. Ed. 2d 530 (January 12, 1977), this Court held that tax agents with unquestionable probable cause to search and seize nevertheless could not be excused for acting without a warrant because there were no "exigent circumstances" at the time they elected to make the search.

The Chief Justice emphasized the key point of parallel between that case and this in his concurring opinion saying that—

"... the factual setting of this case provides what seems, to me, a classic illustration of the dividing line between an impermissible, warrantless entry and one permissible under the 'exigent circumstance' exception to the Fourth Amendment warrant requirement.

"... By failing to act at once, the exigency was dissipated and I do not understand our opinion to imply, in any way, that the removal of cartons, which could reasonably have contained relevant records needed by the government, would not have been an exigent circumstance permitting immediate seizure without the warrant required by the Fourth Amendment."

—50 L. Ed. 2d at 530

In the present case it may be assumed that the officers had probable cause to arrest Petitioner Pierce and his companion in the doctor's office or immediately

afterward if they could catch and identify them. The doctor's testimony of Pierce's offer to sell what he told the doctor were stolen diamonds, if communicated to the officers at the time, undoubtedly constituted probable cause to believe he did have stolen diamonds when he left the doctor's office, and exigent circumstances justifying action without a warrant.

But the officers lost sight of the pair between the office and Fisher's truck, when they could have been passed to Fisher or hidden in the truck, which was never searched.

Later they lost track of Pierce again for a period of more than two hours* except for a radio report that he had been seen driving a Buick toward Nashville. There was no longer any reason to believe he had the diamonds, and the officers never learned any new facts renewing the probable cause to believe he still had the diamonds.

They resumed surveillance when he showed back up by chance as a restaurant in Springfield, but he again disappeared with Fisher and a third man into a back room where the officers did not see what was going on. They followed Pierce back to Nashville without investigating either of the two men to whom he might then have passed them if he had still had them, and without attempting to stop the car.

*The Court will note that the trial judge's memorandum on the search and seizure challenge indicates that there was uninterrupted surveillance from the doctor's office to the scene of the automobile stop. The judge, writing from memory perhaps without a transcript before him, is doubtless mistaken, as the foregoing is directly from the testimony of the government's own witnesses, and is not contradicted in any way in any part of the evidence.

At Nashville, they watched Pierce disappear into a motel without attempting to arrest him or to search the car as it sat still on the motel parking lot. They still watched passively when he came out of the motel with three other persons, including the other two petitioners and a Don Wisdom, allowed Wisdom to depart unmolested and watched the three petitioners load luggage into the trunk of the car without attempting to identify who loaded which luggage.

They again watched passively as the three petitioners stopped for gasoline, and it was only when they were 30 miles down the road that they decided to stop the car to search it for stolen diamonds that could have been anywhere by that time.

Not only had the exigent circumstances dissipated, there was no longer even any probable cause to believe the diamonds could be found in the one vehicle out of three they elected to follow.

This not only is directly contrary to *G. M. Leasing, supra*, but it presents an even more precise set of facts to illustrate how both probable cause and exigent circumstances may be dissipated.

4. The Court of Appeals Decision of the Issues Presented as Questions 4 and 5 Herein so Far Sanctions the District Court's Departure From the Accepted and Usual Course of Judicial Proceedings as to Call for the Exercise of This Court's Supervisory Powers in a Context That Also Presents a Question of the Proper Resolution of Cases in Which Defendants May Be Faced With a Choice Between Two Constitutional Rights Which Has Not Been, But Should Be, Decided by This Court.

The prosecuting attorney made it openly clear from the outset that he intended to use the old Star Chamber conspiracy theory (without charging conspiracy) to evade the usual rules of evidence to get in all the prejudicial fruits of the search, either to convince the jury these were bad people who ought to go to jail for something, or to force the defendants into a conflict that would cause one or more to testify against the others.

He knew that some of his evidence really would be inadmissible against any one of the petitioners, if tried alone. At the hearing at which the conflict of interest question arose, he said:

"We've got three defendants, and it's clear that one—at least one of these three defendants, if not all, possessed these notes. It's a possession offense, and the only way, as I see it, that anybody is going to be acquitted in this trial is for somebody, one of the three defendants to say that he didn't know anything about these notes, and that they belonged to somebody else, and I don't see how in the world this can be done with the same attorney representing all three."

Unwittingly, perhaps, he well stated the reasons each of the defendants was facing a forced choice among his constitutional rights to (1) an attorney of his choice; (2) his right to call other defendants to testify on his behalf; (3) his right to choose to testify or not to testify on his own behalf only after the government has proved its case against him personally; (4) his right not to incriminate himself; (5) the right to a speedy trial; and (6) a right to a trial on evidence applicable to him alone unconfused with testimony admissible only as against others as required by the most fundamental procedural meaning of due process of law.

Thus the defendants' rights guaranteed under the Fifth and Sixth Amendments were played off against each other to the defendants' prejudice.

This Court has said:

"Joinder of defendants is governed by Rules 8(b) and 14 of the Federal Rules of Criminal Procedure. 'The rules are designed to promote economy and efficiency and to avoid a multiplicity of trials, where these objectives can be achieved without substantial prejudice to the right of the defendant to a fair trial.' *Daley v. United States*, 231 F. 2d 123, 125. An important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence. See, e.g., *Blumenthal v. United States*, 332 U. S. 539, 559-560."

—*Bruton v. United States*, 391 U. S. 123, 131 (1968), footnote 6

And further:

" . . . Nor can we fashion a hard-and-fast formula that, when a conspiracy count fails, joinder is error as a matter of law. We do emphasize, however, that, in such a situation, the trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice does appear."

—*Schaffer v. United States*, 362 U. S. 511, 516 (1960)

Here it is clear that the judge participated actively and abused his discretion to deny the petitioners a well-justified severance both by effectively forcing the counsel of their choice to withdraw and by dismissing the first indictment in the absence of the defendants and in a manner that denied two of the defendants their right to a speedy trial and had the effect of granting the government a continuance which the judge himself said would be inequitable.

The prejudice and the judge's knowledge of it is shown by contrasting the two jury verdicts with the trial judge's comment on motion for directed verdict at the close of the first trial:

"Now, Mr. Whitley, I am going to tell you something, I think you are in real trouble as far as Mr. Rich's clients are concerned . . . I am going to let the jury pass on it, because I think the jury will take me off of the hook, but I think I ought to tell you that it is my present intention, if the jury doesn't take me off of the hook, I'm going to issue a judgment of acquittal as far as

Mr. Rich's clients are concerned. I'm going to give a lot of thought about Mr. Wilson's client, because that's an entirely different ball game.

" . . .

"But the rules give me this opportunity to limit it to the jury. I am going to submit it to the jury, but I must tell you I just don't believe you have made it on two of them, and I'm not sure you have made it on the third one, but I will say that your case against Mr. Pierce is substantially stronger than your case against Farmer and Swonger."

CONCLUSION

The petitioners respectfully contend they were prosecuted for offenses for which they were not charged and sentenced on the same basis. Certiorari should be granted to consider each of the questions presented to assure that any conviction or forfeiture against each petitioner be based on legally obtained evidence material and relevant to the specific charge against him.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT**FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

UNITED STATES OF AMERICA

v.

CHESTER PAUL SWONGER
JESS WARREN PIERCE
ZELLA FAYE FARMER

No. 75-220-NA-CR

MEMORANDUM—Received for entry 9:00 A.M.,
December 11, 1975

The defendants heretofore having filed a Motion For Return of Property and Suppression of Evidence in this case, a hearing on said motion was held before the court on November 24 and 25, 1975. The motion seeks the suppression of all items as evidence which were seized from the defendants by local, state and federal officers after the defendants had been stopped in a 1975 Buick automobile on Interstate 40 in Dickson County, Tennessee. The motion further seeks the return of all seized items to the defendants pursuant to *Rule 41(e), Federal Rules of Criminal Procedure*.

It was stipulated that the automobile was searched without a warrant on October 10, 1975. The Government then proceeded to introduce proof for the purpose of justifying the warrantless search and seizure.

Testimony showed that on the evening of October 9, 1975, Dr. John Wilkison, a 71 year-old physician of Springfield, Tennessee, contacted SA Birdwell of the FBI by telephone and informed Birdwell that one Fred Fisher wanted

to introduce a friend to the doctor for the purpose of selling the doctor some diamonds. Fisher had told Dr. Wilkison that the diamonds were "hot." Dr. Wilkison reported to Birdwell that he had made an appointment with Fisher and Fisher's friends to see the diamonds at Dr. Wilkison's office at 9:00 a.m. the next day, October 10.

This was not the first contact Dr. Wilkison had had with Fisher concerning allegedly stolen property. On May 22, 1975, Fisher had called the doctor and told him that some friends of Fisher's were in town and had a large quantity of stolen coins which they desired to sell to the doctor. According to Fisher, the coins were stolen "from somewhere on the East Coast" and the owners of the collection were on an extended vacation in Europe and were unaware of the theft at that time.

On this occasion in May, Dr. Wilkison was unable to contact SA Birdwell although he attempted to do so several times. Failing to contact Birdwell, he thereafter called Fisher on the telephone and told him he was not interested. Later, after speaking with Birdwell and acting on the advice of Birdwell, he called Fisher back and learned from Fisher that the persons who allegedly had the coins for sale had already left town. Fisher then told the doctor that if they came back at a later date, he would contact Dr. Wilkison again. This, apparently, set the stage for the October 9, 1975, call to Dr. Wilkison.

After speaking with Dr. Wilkison the evening before, SA Birdwell and TBI Agent Bill Holt went to Dr. Wilkison's office in the early morning hours of October 10, 1975. There, with the doctor's permission, they installed a recording device in the room where Dr. Wilkison was to meet with Fisher and his friend.

At approximately 9:20 a.m. on October 10, two men, one of which was Fisher, met with Dr. Wilkison in the room. The man with Fisher, later identified as the defendant Pierce, displayed four diamonds to the doctor which, in the

doctor's opinion, were worth at least \$75,000.00. Pierce asked \$20,000.00 for the diamonds and he told Dr. Wilkison that they had been stolen "at least six months ago from a place at least 2,000 miles away." Dr. Wilkison told Pierce that he would like to arrange for a gemmologist to appraise the diamonds before purchasing them, so Fisher and Pierce left with the diamonds, saying they would return when the doctor made arrangements with a gemmologist. Pierce had the diamonds in his possession.

After learning the substance of the conversation between the three men from Dr. Wilkison, Agents Birdwell and Holt joined TBI Agent Bill Vest and various local officers in a surveillance of Fisher and Pierce had had already begun. Fisher and Pierce left the office in Fisher's truck, but Pierce later got in the 1975 Buick in which the defendants were later stopped. The agents and officers, keeping in radio contact with one another, kept Pierce under surveillance in Springfield until he left, driving toward Nashville.

Pierce was followed to Nashville where he stopped at a motel. He entered the motel, stayed approximately 20 minutes, and emerged with two people later identified as defendants Farmer and Swonger. A third person was with him also, but this third person left in another car from the motel and was not identified until after the defendants were arrested. The three defendants got in the 1975 Buick and departed the motel, driving west out of Nashville on Interstate 40.

Meanwhile, TBI Agent Holt had determined through a check with the National Crime Information Center computer that the license plate on the Buick was registered to a 1975 Cadillac. The license plate was from the state of Arkansas.

After following the defendants for some time on Interstate 40 West, TBI Agent Vest and FBI Agent Birdwell, traveling in the same car, concluded that they had probable cause to stop the Buick and search it for stolen diamonds.

At the agents' request, defendant Farmer stopped the Buick, and Agent Vest advised the occupants that he had probable cause to believe that the car contained stolen property and that the car would be searched.

Agent Vest testified that upon approaching the car he could smell the odor of marihuana emanating from it. Robertson County Sheriff Ted Emery observed in plain view in the back seat of the automobile what was described as a pipe devised for smoking marihuana. A cursory search of the car's interior by Agent Vest revealed two marihuana cigarettes in the ash tray and a quantity of marihuana in defendant Farmer's purse. Vest then immediately placed all three persons under arrest for the state offenses of possession of marihuana and possession of narcotics paraphernalia.

Thereafter, Vest opened the trunk of the vehicle and discovered that it was completely filled with clothes, suitcases and other personal effects. He then closed the trunk and determined that the vehicle could more safely be searched if it were off the interstate highway. The car and the defendants were then transported to the Dickson County Sheriff's office where the car was thoroughly searched shortly after arrival.

The search revealed two altered Federal Reserve Notes—a \$100 bill and a \$10 bill—and numerous other items considered by the Government to be of evidentiary value. Although some purportedly phony diamonds were found, no genuine diamonds were discovered.

Since the altered Federal Reserve Notes were found, agents of the United States Secret Service were called into the investigation. Inasmuch as the 1975 Buick contained the altered notes, the Secret Service agents seized the automobile pursuant to 49 U.S.C. § 781. The Secret Service later took custody of all the items seized pursuant to the warrantless search.

The court finds that the officers had probable cause to search the defendant's automobile for stolen diamonds at the time the car was stopped on the interstate highway. It has long been established that there is a difference in searching an automobile on the open highway without a warrant and searching a home or office without one. In the landmark case of *Carroll v. United States*, 267 U. S. 132 (1925), the United States Supreme Court ruled that if an officer has reason or probable cause for believing that the automobile which he stops contains contraband, that officer may search the vehicle without a warrant where it is not practicable to secure a warrant because of the mobility of the vehicle. See also *Brinegar v. United States*, 338 U. S. 160 (1949). The facts in this case also closely resemble those in *United States v. Jackson*, Sixth Circuit Number 75-1528, recently decided, in which the Court upheld the warrantless search of a vehicle.

The search is not rendered unreasonable because of the fact that a cursory search was conducted on the highway, while a more thorough search was effected after the automobile had been transported to the Dickson County Sheriff's Office. A closely similar situation was before the Supreme Court in *Chambers v. Maroney*, 399 U. S. 42 (1970). The Court in *Chambers* upheld the warrantless search of an automobile at a station house after the automobile had been stopped on the open highway. After determining that there was probable cause for the search of the automobile, the Court stated that "there is little to choose in terms of practical consequences between an immediate search without a warrant and the car's immobilization until a warrant is obtained. *Id.* p. 52.

In the instant case, as in *Chambers* (see footnote 10), a careful search of the defendants' car was impractical and perhaps not safe on the shoulder of the interstate highway. It served the owner's convenience and safety to have the car searched at the sheriff's office.

The fact that the officers may have had probable cause to arrest Pierce and search the 1975 Buick before he left Springfield does not affect the validity of the search. Exigent circumstances with regard to vehicles are not limited to situations where probable cause is unforeseeable and arises only at the time of arrest. The fact that the officers could have stopped and searched Pierce and his automobile earlier does not negate the need for the officers' action out on the interstate highway. *Cardwell v. Lewis*, 417 U. S. 583, 595-596 (1974).

TBI Agent Vest, based upon his discovery of the marijuana and marijuana smoking device, had probable cause to arrest the defendants under Tennessee law.

After the Secret Service agents learned that the 1975 Buick was used to conceal and transport the two altered Federal Reserve Notes, they seized the car for forfeiture pursuant to 49 U.S.C. § 781, *et seq.* Probable cause alone, without a warrant, is sufficient to justify the seizure of the 1975 Buick. *United States v. White*, 488 F. 2d 563 (6th Cir. 1973). Therefore, the seizure of the automobile in this case is justified.

Inasmuch as the intent of the defendants in possessing the altered Federal Reserve Notes is an element which must be proved at trial by the Government, the items seized which have not heretofore been returned to the defendants are lawfully in the custody of the Government.

Accordingly, for the reasons set forth above, the defendants' Motion to Return Property and Suppress Evidence is denied.

An order will be entered.

(s) L. Clure Morton

United States District Judge

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

UNITED STATES OF AMERICA

v.

ONE 1975 BUICK RIVIERA AUTO-
MOBILE, SERIAL NUMBER
4Z87T5H514224

No. 76-113-NA-CV

MEMORANDUM—Received for entry 3:00 P.M.

November 9, 1976

This case involves the forfeiture of an automobile pursuant to the provisions of 49 U.S.C. §§ 781 and 782. Section 781 provides, in pertinent part:

(a) It shall be unlawful (1) to transport, carry, or convey any contraband article in, upon, or by means of any vessel, vehicle, or aircraft; (2) to conceal or possess any contraband article in or upon any vessel, vehicle, or aircraft, or upon the person of anyone in or upon any vessel, vehicle, or aircraft; or (3) to use any vessel, vehicle, or aircraft to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of any contraband article.

(b) As used in this section, the term "contraband article" means—

• • •

(3) Any falsely made, forged, altered, or counterfeit coin or obligation or other security of the United States or of any foreign government; or any material

or apparatus, or paraphernalia fitted or intended to be used, or which shall have been used, in the making of any such falsely made, forged, altered, or counterfeit coin or obligation or other security.

Section 782 provides, in pertinent part:

Any vessel, or aircraft which has been or is being used in violation of any provision of section 781 of this title, or in, upon, or by means of which any violation of said section has taken or is taking place, shall be seized and forfeited. . . .

On October 10, 1975, Special Agents of the United States Secret Service seized in Dickson County, within the Middle District of Tennessee, as forfeited to the United States, certain property, to wit: one 1975 Buick Riviera automobile, bearing Serial No. 4Z87T5H514224, its equipment and accessories. Since its seizure said automobile has remained in the Middle District of Tennessee within the custody and control of the United States Secret Service. It is presently being stored at Allright Parking, 133 Seventh Avenue, North, Nashville, Tennessee. Said automobile is registered in the State of Arkansas for the year 1975 in the name of Zella Faye Farmer, Route #2, Prairie Grove, Arkansas. At the time of the seizure, the automobile had an appraised value of Seven Thousand Dollars (\$7,000.00).

The Government's complaint for forfeiture alleges that the 1975 Buick Riviera was used to transport and to facilitate the possession and concealment of two altered United States Federal Reserve Notes in violation of 49 U.S.C. §781. Zella Faye Farmer, along with her co-defendants Chester Paul Swonger and Jess Warren Pierce, were tried in the United States District Court for the Middle District of Tennessee on June 10, 1976, for possession and concealment of two altered Federal Reserve Notes, with knowledge that

the bills were altered, and with intent to defraud, in violation of 18 U.S.C. §§472 and 2. The defendants were found guilty.

Briefly, the evidence as adduced at trial is as follows:

Jess Warren Pierce attempted to sell certain diamonds to a physician in Springfield, Tennessee, on the morning of October 10, 1975. Pierce represented that the diamonds were stolen "out of state." This conversation was related to an FBI agent who was on the premises. Pierce was unable to sell the diamonds, and was placed under surveillance by the agents after he left the physician's home. The agents lost sight of Pierce shortly after he began driving a 1975 Buick Riviera. Pierce apparently left the city for a period of two to three hours.

Pierce returned to Springfield at approximately 12:00 noon. He again attempted to dispose of some diamonds. He was again unsuccessful, and was again surveilled as he drove away in the 1975 Buick Riviera. On this occasion, however, the agents were successful in continuing their surveillance. They followed Pierce as he left Springfield, drove to Nashville, and parked at a motel. There the agents lost sight of him as he apparently entered the motel.

After a short period of time had elapsed, Pierce reappeared. He was accompanied by Swonger and Farmer. The three placed luggage in the trunk of the Buick, and then drove away from the motel. Farmer was driving. The agents followed the car as it was driven from Davidson County to Dickson County on Interstate 40. The car was stopped in Dickson County by TBI agents. The occupants were arrested on charges including transportation of stolen diamonds, and the automobile was searched.¹ As a result of the search, the altered Federal Reserve Notes (one \$100 bill and one \$10 bill) were discovered. Also recovered was

¹The court has previously ruled that the arrest and subsequent search and seizure were lawful. *United States v. Swonger, et al.*, No. 75-220-NA-CR (M.D. Tenn., filed December 11, 1975).

paraphernalia customarily used in schemes known as "Bait and Switch" and the "Green Goods Game." In addition, Farmer and Swonger had false identifications capable of being used in other types of swindles in their possession.

The defendant contends that the seizure of the automobile was unlawful and that Sections 781 and 782 are unconstitutional. However, the court finds that the seizure was lawful, and that Sections 781 and 782 are not unconstitutional as applied to this particular set of facts. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U. S. 663, 680-690, 94 S. Ct. 2080, 40 L. Ed. 2d 452 (1974); *United States v. One 1969 Plymouth Fury Automobile*, 476 F. 2d 961 (5th Cir. 1973); *United States v. One 1967 Ford Mustang*, 457 F. 2d 931 (9th Cir.), *cert. denied*, 409 U. S. 850 (1972). Therefore, since the 1975 Buick Riviera was used, among other things, to transport altered Federal Reserve Notes in violation of §781, it shall be forfeited pursuant to §782.

An appropriate order will be entered.

(s) L. Clure Morton
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Nos. 76-2555 & 2556

UNITED STATES OF AMERICA - - - Plaintiff-Appellee

v. No. 76-2555

CHESTER PAUL SWONGER, et al. - Defendants-Appellants

UNITED STATES OF AMERICA - - - Plaintiff-Appellee

v. No. 76-2556

ONE 1975 BUICK RIVIERA AUTOMOBILE, SERIAL
NUMBER 4Z87T5H514224

(ZELLA FAYE FARMER - - - Claimant-Appellant)

ORDER—Filed June 21, 1977

Before PHILLIPS, Chief Judge, WEICK and LIVELY, Circuit Judges.

Upon consideration of the briefs, appendix, and arguments of counsel, we are of the opinion that the District Court did not err in upholding the validity of the search and seizure of the Buick automobile; that the Court did not err in denying the motions for judgment of acquittal, as there was substantial evidence to support the judgment of conviction of each appellant; that the Court did not err in denying the motions to dismiss the indictments, or for bills of particulars, or in denying the motions for severance.

We find no merit in the contention that the appellants were denied a speedy trial, or that they were prejudicially

denied the right to be represented by counsel of their own choice.

We find no error in the admission of evidence or in the instructions of the Court to the jury, or in the directing of the forfeiture of the automobile, or in the sentencing of the defendants.

It is therefore ORDERED that the judgments of conviction and of forfeiture be and each of the same is hereby **AFFIRMED**.

ENTERED BY ORDER OF THE COURT.
(s) John P. Hehman
Clerk

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Nos. 76-2555 & 2556

UNITED STATES OF AMERICA - - Plaintiff-Appellee

v. No. 76-2555

CHESTER PAUL SWONGER, et al. - Defendants-Appellants

UNITED STATES OF AMERICA - - Plaintiff-Appellee

v. No. 76-2556

ONE 1975 BUICK RIVIERA AUTOMOBILE, SERIAL
NUMBER 4Z87T5H514224

(ZELLA FAYE FARMER - - Claimant-Appellant)

ORDER—Filed July 28, 1977

Before PHILLIPS, Chief Judge, WEICK and LIVELY, Circuit Judges.

This case is before us on a motion of the defendants-appellants for leave to file an extended petition to rehear or for alternative relief.

The Order affirming the judgment was entered by this Court on June 21, 1977. Under Rule 40(a) of the Federal Rules of Appellate Procedure a petition for rehearing was required to be filed within fifteen days thereafter, or no later than July 5, 1977.

By letter dated July 6, 1977 counsel for defendants-appellants mailed to the Clerk of this Court a "Petition for Rehearing and Suggestion for Rehearing In Banc", con-

sisting of 24 pages, which petition was produced, not by printing, but by other process of duplicating or copying, and which petition was received by the Clerk on July 7, 1977. Under Rule 40(b) such a petition should contain not more than fifteen pages.

The motion to file the extended petition to rehear or for alternative relief was received by the Clerk on July 11, 1977. It is denied in its entirety for the reason that the petition for rehearing was not timely filed or timely tendered for filing.

We have nevertheless considered the recent decision of the Supreme Court in *United States v. Chadwick*, — U. S. — 45 U.S.L.W. 4797 (No. 75-1721, decided June 21, 1977), and in our opinion it is inapposite. The double-locked-footlocker search involved in *Chadwick* was held by the Supreme Court not to be justified under the "automobile exception" because a person's expectations of privacy in personal luggage are substantially greater than in an automobile. The altered federal reserve notes in the present case were found in a flight bag in the trunk of defendant's automobile, in a search which was upheld as valid as being incident to a valid arrest and also was founded upon probable cause.

ENTERED BY ORDER OF THE COURT.

(s) John P. Hehman

Clerk

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

No. 76-2555
76-2556

UNITED STATES OF AMERICA - - Plaintiff-Appellee

v.

CHESTER PAUL SWONGER, JESS WARREN
PIERCE and ZELLA FAYE FARMER
(76-2555)

ONE 1975 BUICK RIVIERA AUTOMOBILE,
SERIAL NUMBER 4Z87TH514224
(76-2556) - - - Defendants-Appellants

ORDER STAYING MANDATE—Filed August 5, 1977

(Before: PHILLIPS, Chief Judge, WEICK and LIVELY, Circuit Judges.

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT.

(s) John P. Hehman

Clerk

DEC 29 1977

MICHAEL RODAK, JR., CLERK

No. 77-314

In the Supreme Court of the United States

OCTOBER TERM, 1977

CHESTER PAUL SWONGER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF HABEAS CORPUS TO THE UNITED
STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCGREE, JR.,

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-314

CHESTER PAUL SWONGER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The orders of the court of appeals affirming petitioners' convictions (Pet. App. 45-46) and denying a petition for rehearing (*id.* at 47-48) and the opinions of the district court (*id.* at 35-40, 41-44) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 1977. An untimely petition for rehearing was denied on July 28, 1977. The petition for a writ of certiorari was filed on August 26, 1977, and is therefore out of time under Rule 22(2) of the Rules of

this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the warrantless, probable cause search of the trunk of petitioners' automobile violated the Fourth Amendment.
2. Whether the district court erred in denying petitioners' motions for a severance.

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Tennessee, petitioners were convicted of possession and concealment of two altered federal obligations, in violation of 18 U.S.C. 472 and 2. Petitioners Pierce and Swonger were sentenced to six and five years' imprisonment, respectively. Petitioner Farmer's sentence of five years' confinement under the Youth Corrections Act was suspended in favor of five years' probation. The vehicle used to transport the altered obligations, in violation of 49 U.S.C. 781, was forfeited under 49 U.S.C. 782. The court of appeals affirmed the convictions and forfeiture (Pet. App. 45-46).

The evidence at the hearing on petitioners' suppression motions showed that on October 9, 1975, Dr. John Wilkison, a physician in Springfield, Tennessee, informed Agent Don Birdwell of the Federal Bureau of Investigation that he had made an appointment with a man named Fred Fisher for the following morning, at which time Fisher would introduce a friend who

wanted to sell stolen diamonds to Wilkison. On a prior occasion, in May 1975, Fisher had contacted Dr. Wilkison about a large quantity of stolen coins that he had for sale, but the doctor had declined the offer because he had been unable to contact Agent Birdwell. Following his receipt of information about the stolen diamonds, Agent Birdwell equipped the X-ray room of Dr. Wilkison's office with electronic surveillance devices (1 Tr. 60-66).¹

At approximately 9:30 a.m. on October 10, Fisher, accompanied by petitioner Pierce, arrived at Dr. Wilkison's office. Petitioner Pierce showed Dr. Wilkison four diamonds that appeared to Wilkison to be worth at least \$75,000. Petitioner Pierce stated that he wanted \$20,000 for the stones and that they had been stolen "years ago" and "[t]housands of miles away" and were "perfectly safe." Dr. Wilkison told petitioner Pierce that he would like to have a gemologist appraise the diamonds, but Pierce and Fisher instead left with the stones, assuring Wilkison that they would return whenever the doctor had made arrangements with his expert. The two men were then followed by police officers who had been present in one of Dr. Wilkison's offices during the negotiations and had overheard parts of the discussions (1 Tr. 66-69, 203).

Outside Dr. Wilkison's office, Agent Bill Vest of the Tennessee Bureau of Criminal Investigation observed

¹ "Tr." refers to the transcript of the proceedings on the motions to suppress (Vol. 1) and at trial (Vol. 2).

Fisher and petitioner Pierce depart, enter a truck, and drive to a cafe. Twenty minutes after their arrival at the cafe, Fisher reentered the truck and proceeded toward Springfield. Agent Vest followed the vehicle to a location near the sheriff's office, where Fisher parked. While Agent Vest kept the truck under surveillance, he received information that police officers had observed a man fitting petitioner Pierce's description driving toward Nashville in a brown Buick with Arkansas license tags (1 Tr. 12-15, 70).

At about noon, Agents Vest and Birdwell saw Fisher again enter the truck, this time to drive to a restaurant, where he was joined by Curtis Mott and petitioner Pierce, who had arrived in a brown Buick. After the three men had left the restaurant, petitioner Pierce got into the Buick and proceeded toward Nashville at speeds from 50 to 80 miles per hour, eventually stopping at a motel. Approximately 15 to 30 minutes after petitioner Pierce had entered the motel, police officers observed him emerge with petitioners Swonger and Farmer and another man, later identified as Don Wisdom (1 Tr. 16, 19-21, 24, 70-73).

Petitioners placed several pieces of luggage into the Buick and drove off toward Interstate 40 west, followed by police surveillance teams. After trailing petitioners for some distance, Agents Birdwell and Vest stopped the vehicle and asked the occupants to get out of the car. As the passenger door opened,

Agent Birdwell spotted a device for smoking marijuana on the floor of the vehicle and two marijuana cigarettes in an ashtray. Agent Vest immediately arrested petitioners for possession of marijuana, in violation of Tennessee state law. He then opened the trunk of the vehicle and discovered that it was filled with suitcases, clothes and various implements used in making counterfeit money (1 Tr. 21, 26-28, 31, 75).

Agent Vest determined that he would be unable to make a proper search of the trunk while the vehicle was on the road. He therefore transported the car to the Dickson County Sheriff's office, where a thorough search of the trunk revealed a General Motors Acceptance Corporation payment book in the name of G. W. Pierce, which contained a \$100 federal reserve note and a \$10 note, a map containing \$100 and \$10 notes bearing the same serial numbers as the two previously found bills, and a plastic bag containing four stones that looked like diamonds but were later found not to be genuine (1 Tr. 28, 31-34, 47).

ARGUMENT

1. Petitioners contend (Pet. 25-29) that Agent Vest's search of the automobile and seizure of the altered currency and stones violated the Fourth Amendment.

a. Although petitioners concede that petitioner Pierce's attempted sale of "stolen diamonds" "undoubtedly" gave the police officers probable cause to

arrest and search Pierce (Pet. 28), they claim that the probable cause had dissipated by the time of their arrests and the search of their automobile five hours later, because the officers' surveillance of petitioner Pierce had been interrupted and "[t]here was no longer any reason to believe he had the diamonds * * *" (*ibid.*). After a thorough review of the record, however, the district court concluded that "the officers had probable cause to search [petitioners'] automobile for stolen diamonds at the time the car was stopped on the interstate highway" (Pet. App. 39), and the court of appeals agreed (*id.* at 45). This finding is correct and does not warrant further review.

The evidence showed that police officers had received a tip from Dr. Wilkison that Fisher and another man, later identified as petitioner Pierce, would be coming to Wilkison's office to sell him stolen diamonds. During the meeting, the officers overheard conversations about stolen diamonds and a purchase price of \$20,000, confirming Dr. Wilkison's information (1 Tr. 84-85). These circumstances, as petitioners acknowledge, established probable cause to believe that petitioners were engaged in an attempted sale of stolen property, in violation of state law, and that petitioner Pierce was in possession of the property. The fact that the officers lost sight of petitioner Pierce for two hours during their surveillance does not significantly alter this conclusion. Although, as petitioners observe, this gap meant that Officer Vest could not know with certainty whether

petitioner Pierce still had the diamonds in his control at the time of the arrests and search, the Fourth Amendment required only that the officer have a *reasonable* belief that a crime had been perpetrated and that Pierce and his companions were involved in that crime. *Brinegar v. United States*, 338 U.S. 160, 174-175. Moreover, in view of the fact that petitioner Pierce was driving an out-of-state vehicle and that he and the other men had been observed loading a number of suitcases into the vehicle in front of their motel, the officers had additional grounds to suspect that the diamonds were in the car.

b. Petitioners' claim that a warrant was required because the officers had sufficient time to obtain one is also incorrect. This Court has long "recognized significant differences between motor vehicles and other property which permit warrantless searches of automobiles in circumstances in which warrantless searches would not be reasonable in other contexts. *United States v. Chadwick*, No. 75-1721, decided June 21, 1977, slip op. 10.² Although this distinction "has been based in part on [an automobile's] inherent mobility, which often makes obtaining a judicial warrant impracticable," it has also, and more significantly, been based upon "the diminished expectation of privacy which surrounds the automobile" (*ibid.*). Since the search in this case was supported by probable cause, it was reasonable for the officers to proceed

² *Chadwick*, unlike the present case, did not involve the automobile search exception to the warrant requirement.

without a warrant. *Chambers v. Maroney*, 399 U.S. 42, 48-52.³

2. Petitioners contend (Pet. 30-33) that the district court's denial of their motions for a severance deprived them of their rights to be represented by counsel of their choice and to obtain a speedy trial. Petitioners also assert that the ruling denied them a fair trial, because evidence admitted at their joint trial would not have been admissible at separate trials. These claims are insubstantial.

Considerations of judicial economy and the public interest underlie the settled principles that defendants jointly indicted should be tried together except for the most compelling reasons (see *United States v. Ehrlichman*, 546 F. 2d 910, 929 (C.A. D.C.), certiorari denied, 429 U.S. 1120; *United States v. Peterson*, 524 F. 2d 167, 182 (C.A. 4), certiorari denied, 424 U.S. 925; *United States v. Perez*, 489 F. 2d 51, 65 (C.A. 5), certiorari denied, 417 U.S. 945; *United States v. Cervantes*, 466 F. 2d 736, 739 (C.A. 7), certiorari denied, 409 U.S. 886) and that the grant or denial of a severance is addressed to the sound discretion of the district court. *Schaffer v. United States*, 362 U.S. 511, 514-517; *Opper v. United States*, 348 U.S. 84, 95. Petitioners have failed to advance sufficient reasons why they should not have been tried together and

³ Indeed, since the officers spotted a controlled substance in the car at the time of petitioners' arrest, the vehicle was properly seized for forfeiture (21 U.S.C. 881(a)(4), 881(b)(4)) and was subject to a warrantless search under *Cooper v. California*, 386 U.S. 58.

have failed to demonstrate an abuse of discretion on the part of the district court.

a. Following the denial of the severance motions, petitioners' counsel (who represented them jointly) informed the court that he believed there was a possibility of a conflict of interest, especially if the court ruled that evidence of the attempted sale of the diamonds by petitioner Pierce was admissible at the trial of all petitioners (1 Tr. 225-226). The court responded that it was "going to let that evidence in" (1 Tr. 229), but it agreed that, since two of the petitioners were mere passengers in the vehicle and the proof of possession as to them may be less convincing, defense counsel might have a conflict (1 Tr. 228). The court therefore granted a continuance to allow petitioners' counsel to settle the conflict problem.

One week later, the court held a hearing, at which each petitioner submitted a written request to be jointly represented by defense counsel despite the possible prejudice from such representation (1 Tr. 240). The court remarked that it viewed petitioners' requests as an attempt to force reconsideration of their motions for a severance, which it would refuse to do (1 Tr. 240-241). It also informed petitioners that their actions, which were knowing and voluntary, would constitute a waiver of their right subsequently to raise a conflict of interest claim (1 Tr. 241). After petitioners acknowledged that they understood these consequences, the court stated (1 Tr. 246):

I will give it some thought, but I will tell you, gentlemen, I believe we have a conflict

here, and I don't think that I have the constitutional right to tell a man he cannot hire somebody.

If that lawyer is willing to accept employment, and I am not passing on that question, Mr. Branstetter [defense counsel], you understand that. I don't give you any shields down here and I don't cloak you with any authority.

I think I have stated on the record before and I stated again that I think there is an inherent conflict, and if you represent all three of these people, I think you are in a very peculiar position, and so that's all I am going to say * * *.

Two days thereafter defense counsel declined to represent any of the petitioners.

Petitioners claim that this chain of events, beginning with the district court's evidentiary ruling and its denial of a severance, denied them the right to counsel of their choice. But a defendant's right to a particular attorney is not absolute and "cannot be insisted upon in a manner that will obstruct an orderly procedure in courts of justice, and deprive such courts of the exercise of their inherent powers to control the same." *Smith v. United States*, 288 Fed. 259, 261 (C.A. D.C.). Moreover, petitioners' conclusion falls with its premise. A severance is not required simply because some of the evidence introduced at a joint trial may not relate to a particular defendant. *United States v. Aloï*, 511 F. 2d 585, 598-599 (C.A. 2), certiorari denied, 423 U.S. 1015; *United States v. Hutul*, 416 F. 2d 607, 620 (C.A. 7), certiorari denied, 396 U.S. 1012. Here, the jury was prop-

erly instructed (2 Tr. 74, 80, 280-281) to apply the evidence of the diamond transaction only against petitioner Pierce. See *Opper v. United States*, *supra*, 348 U.S. at 95. Nor do petitioners contend that they were inadequately represented at trial.* In these circumstances, the public interest in a joint trial outweighed the speculative concern that evidence of the attempted diamond sale would prejudice petitioners Swonger and Farmer. Indeed, petitioners recognized as much at trial, in seeking to waive any claim of a conflict of interest.†

b. On March 31, 1976, petitioners' newly retained counsel informed the court that, in preparing a response to a civil forfeiture complaint against the automobile that had been seized at the time of petitioners' arrest, they had discovered that Rule 7(c)(2), Fed. R. Crim. P., required the pleading to set forth, as part of the indictment in the criminal proceeding, the interest of any defendant in the property subject to forfeiture (1 Tr. 252). The court was also informed that a recent Ninth Circuit decision‡ required dis-

* The quality of representation received by a defendant from substitute counsel is a primary consideration in determining whether a trial judge abused his discretion in denying a severance or continuance in order to enable the defendant to be represented by counsel of his choice. *United States v. Tramanti*, 513 F. 2d 1087, 1116-1118 (C.A. 2), certiorari denied, 423 U.S. 832; *United States v. Bragan*, 499 F. 2d 1376, 1379-1380 (C.A. 4).

† As noted above, the trial court expressly acknowledged that it could not tell petitioners whom they could hire and that it would not order defense counsel not to continue to represent petitioners jointly.

‡ *United States v. Hall*, 521 F. 2d 406 (C.A. 9).

missal of an indictment that failed to set forth such interest (1 Tr. 253). The government immediately asked for a continuance in order to obtain a superseding indictment and "to keep all of the defendants under their present bond" (1 Tr. 261). After the court denied the request, the government moved to dismiss the indictment. The motion was granted (*ibid.*). A superseding indictment charging petitioners with the same offense, but adding a criminal forfeiture count, was returned on April 12, 1976, and petitioners' trial commenced on June 10, 1976.

Petitioners apparently contend (Pet. 32) that the delay of two and a half months between the dismissal of the original indictment and their trial on the superseding indictment denied them a speedy trial. The delay in bringing petitioners to trial, however, was short and was occasioned solely by their belated challenge to the indictment rather than by governmental misconduct or indifference. See *Harrison v. United States*, 392 U.S. 219, 221-222, n. 4; *United States v. Sarvis*, 523 F.2d 1177, 1183 (C.A. D.C.). Furthermore, during the period in question petitioners were not incarcerated, asserted their speedy trial rights in less than vigorous fashion, and raised no substantial claim of prejudice as a result of the delay.⁷

⁷ Petitioners also contend that the district court erred in granting the government's motion to dismiss the indictment in their absence. Under Rule 48(a), Fed. R. Crim. P., however, a government attorney "may by leave of court file a dismissal of an indictment * * * and the prosecution shall thereupon terminate." It is only when a dismissal is sought during trial that it may not be granted "without the consent of the defendant." See *United States v. Valencia*, 492 F.2d 1071, 1074 (C.A. 9).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1977.

Supreme Court, U. S.

FILED

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MICHAEL RODAK, JR., CLERK

IN THE

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October Term, 1977

No. 77-314

CHESTER PAUL SWONGER

ZELLA FAYE FARMER and

JESS WARREN PIERCE - - - Petitioners

versus

UNITED STATES OF AMERICA - - Respondent

On Petition for the Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

PETITIONERS' REPLY BRIEF

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

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CHESTER PAUL SWONGER
ZELLA FAYE FARMER and
JESS WARREN PIERCE - - - - *Petitioners*

v.

UNITED STATES OF AMERICA - - *Respondent*

ON PETITION FOR THE WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY BRIEF

In its counter-statement of jurisdiction, the respondent asserts that the petition for writ of certiorari is out of time under Rule 22(2) of the Rules of this Court.

1. Timeliness is not jurisdictional and does not bar this Court's exercise of discretion to consider the petition. *Durham v. United States*, 401 U. S. 481 (1971), overruled on another point, *Dove v. United States*, 423

U. S. 325 (1976); *Taglianetti v. United States*, 394 U. S. 316, n. 1 (1969).

2. The petitioners submit that the petition should be deemed to be in time because of the manner in which the Court of Appeals disposed of the petition to rehear in that Court. Although that Court did state that the motion to file an extended petition to rehear or for alternative relief was "denied in its entirety for the reason that the petition for rehearing was not timely filed or timely tendered for filing" [Pet., p. 48], it went on to consider the merits of the petition to the extent of distinguishing the case of *United States v. Chadwick*, — U. S. —, 53 L. Ed. 2d 538 (No. 75-1721, decided June 21, 1977), on which a large part of the petition to rehear had been based. Petitioners respectfully submit that this consideration of the merits amounted, in effect, to an exercise of the Court's power under Rule 26(b), Federal Rules of Appellate Procedure, to permit an act to be done after the expiration of the allotted time.

3. The petitioners respectfully submit that the Court of Appeals abused its discretion in denying their motion either for leave to file the extended brief under Rule 40(b), F.R.A.P., or for the alternative relief of an extension of time under Rule 26(b), F.R.A.P., within which to file a brief condensed to the standard length prescribed by that Rule. The Clerk had refused to file the petition to rehear because of counsel's failure to remember or discover anew the page limitation, and counsel remained unaware of his error in calculating the time allowed for filing a petition to rehear until receipt of the Court's order of July 28, 1977. In his

motion for leave to file or for an extension within which to condense the petition to proper size, he presented what he considered good cause and a case of excusable neglect in overlooking the page limitation, including the need to include reference to the *Chadwick* case, *supra*, which came to hand on July 1, 1977, which (in retrospect) appears to have been the date the petition should have been mailed for delivery on the first day after the Independence Day weekend. If he had been aware of error in calculation of the time, he could have pointed out further in support of extension of time these facts: (1) the order of affirmance had been entered only seven days after oral argument and arrived, to the best of counsel's recollection six days later than that on Monday, June 27; and (2) that he had, in fact, less than five days, for preparation of the petition for mailing on the Friday before the next court day when it was due.

4. The petitioners submit that, if they be wrong in the foregoing, nevertheless this case presents serious and important questions that merit full consideration by this Court, and that the unusual circumstances of timing and disposition in the Court of Appeals and the delays in the respondent's brief constitute good cause for waiving the time between June 21 and July 28, 1977. The petition for certiorari was filed within 30 days after the latter date.

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